

# Nice

## The Charter of Fundamental Rights of the European Union

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In this article the authors expose the mechanics of the newly adopted Charter of Fundamental Rights and examine its thrust and its interrelation with the EU legal structure and national laws.

### INTRODUCTION

The Nice Intergovernmental Conference of December 2000 (hereinafter the Nice IGC) has resulted *inter alia* in the formal adoption of the Charter of Fundamental Rights (hereinafter the Charter) by the member states. The Charter was the outcome of laborious efforts of the "Convention", an *ad hoc* body established by the European Council in late 1999 in order to materialise the changes in the field of Justice and Home Affairs brought about by the Amsterdam Treaty. The Charter serialised in a single instrument existing legal principles of human rights and fundamental freedoms scattered in various legal sources at international and national levels. It also codified provisions found in the constitutions of member states relating to civil and political rights as well as social and economic rights.

The Charter, although epitomising the mandate of the Maastricht and Amsterdam Treaties to bring into the (supranational) EU law making structure policies relevant to justice and home affairs, it has opened a debate over its legal status and its interface with *acquis communautaire* and national laws. Despite of the fact that the Charter draws legitimacy from the EU Treaties, the ECHR, case law of the European Court of Justice and various intergovernmental agreements amongst the member states of the European Union, its legal status caused a great deal of controversy. During the Nice IGC, the European Council was confronted with two options: incorporate the Charter into the EU Treaties or solemnly declare its conclusion. Reality prevailed and the Charter received a solemn political declaration by the European Council. However, many European institutions favour the formal incorporation of the Charter into EU law in order to disperse to European citizens the rights and freedoms envisaged therein.

### THE PRINCIPLES OF THE CHARTER OF FUNDAMENTAL RIGHTS

Drawing from its mixed heritage of rights, the European Union has created a Charter containing an unusual amalgamation of rights. It combines old and new, and brings together rights of national, international and

European origin. The Charter rejects the international tradition of segregation between civil and political rights on the one hand, and economic and social rights on the other, as found in the respective instruments of the International Convention on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR). In addition to aggregating established civil and social rights, the European Charter incorporates some more contemporary concerns, such as data protection and eugenics. Finally, the Charter contains certain rights specific to the European Union and seeks to make the Union itself more transparent and accountable. This novel and eclectic parcel of rights is endorsed by the Commission on the basis that it emphasises 'the indivisibility of rights' (COM (2000) 644). The Charter may be viewed as a unique collection of the rights and values recognised by the Union as applying to its citizens.

The Preamble to the Charter asserts a need to strengthen the protection of fundamental rights 'in the light of changes in society, social progress and scientific and technological developments' (which may explain the inclusion of some of the more contemporary rights). The rights are placed in the context of supporting Europe's general aims of an ever-closer union and economic development. The Preamble refers to common values and identifies the 'indivisible, universal values' of human dignity, fundamental freedoms, equality and solidarity. In addition, it talks of placing 'the individual at the heart of its activities'.

Whilst establishing these common values, and recognising the individual, the Charter reaffirms its commitment to the principle of subsidiarity and acknowledges respect for 'the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States'.

Finally, the Preamble places the individual rights in a broader, social context stating that 'enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations'. This statement may be a reflection of the



collective nature of human rights and espouse a collective responsibility. Alternatively, the statement may be seen as an aid to construction of the rights within the Charter. Of these rights, some may not be absolute, or lack precision, whilst other rights may conflict with each other and have to be read and interpreted in conjunction. The recognition of freedom of the sciences (Article 13), for instance, might lend itself to interpretation in the light of such factors mentioned in the Preamble's statement.

The fundamental rights are set out under seven broad chapter headings; dignity, freedom, equality, solidarity, citizens' rights, justice and general provisions. As indicated above, these cover a range of civil and political in addition to economic and social rights and draw from national, international and European influences.

Chapter I, Dignity, contains five articles, recognizing human dignity (without defining it), the right to life, integrity of the person (both physical and mental), prohibition of torture, and of slavery. All of these are familiar fundamental rights to be found in international documents (including the Universal Declaration of Human Rights and the European Convention on Human Rights, ECHR).

Chapter II, Freedoms, lists fourteen different freedoms or rights and in this chapter there is a mix of civil and political, economic and social rights granted recognition. These cover the rights to liberty, to asylum, to protection from expulsion, the right to education and the right to marry and found a family, and the freedoms of thought, expression, and assembly. The right to privacy (Article 7) is included and a separate article (Article 8) is added, recognising a specific right to protection of personal data. The right to property (Article 17) includes protection of intellectual property. A right to work, and freedom to choose an occupation (Article 15), sits alongside a separate freedom to conduct a business (Article 16). Academic freedom is recognised (Article 13) together with freedom of the arts and scientific research.

Chapter III, Equality, starts (in Article 20) by affirming one arm of the rule of law, the principle of equality before the law. It then reaffirms (in Article 21) the Union's own commitment to non-discrimination on a broad range of grounds (including age and sexual orientation), echoing the provisions of Article 13 of the EC Treaty. Respect by the Union for cultural, religious and linguistic diversity is assured (in Article 22). Equality between men and women is granted a separate provision of its own, again following the Union's long history in this field. Various groups are then given separate mention; children, the elderly and those with disabilities.

Chapter IV, headed Solidarity, deals mainly with work-related rights, both collective (such as bargaining and action) and individual (including working conditions and dismissal), and the protection of children and family in

relation to work. In addition, this Chapter recognises entitlements to social security and healthcare. Finally, the Union affirms its support for environmental and consumer protection (Articles 37 and 38).

Chapter V deals with Citizens' Rights. These refer to rights that apply as a citizen of the European Union. Part of this chapter seeks to make the Union more transparent and accountable. It includes the right to good administration by the Union, the right of access to Union documents, and the right of access to a Union Ombudsman. In addition, there are wider rights that attach as a citizen of a frontier less Europe such as the right to vote and stand at elections (both European and municipal), free movement, and reciprocal diplomatic protection by Member States' Consulates for citizens of Europe outside the territory of Europe.

Chapter VI concerns justice and sets out a number of established rights under four articles; the right to a fair trial and effective remedy, the presumption of innocence and right of defence, the principle of proportionality and legality (non-retroactivity) and the right not to be tried or punished twice for the same offence.

Finally, Chapter VII, General Provisions, deals with the scope of the Charter, in the bodies and laws at which it is aimed, the scope of the rights within the Charter and the interaction between the Charter and other human rights instruments (whether international or domestic).

As is not uncommon with human rights, the expression of the rights varies considerably in terms of form or nature. Some articles appear purely declaratory in nature, (Article 20, '[e]veryone is equal before the law'), whilst others seem to engender individual rights, (Article 2.1 states that "everyone has the right to life", Article 35 recognises a right to healthcare). Others are prohibitory in nature (Article 5 prohibits slavery or forced labour).

The tone or expression differs between articles. In Article 22 it is stated that the Union 'shall respect cultural, religious and linguistic diversity'. Similarly, in Article 24 it is stated that children 'shall have the right to such protection and care as is necessary for their well-being'. These may be contrasted with the rights of the elderly and disabled whose rights the Union merely 'recognises and respects'. The expression of the latter lacks the force of the mandatory tone of the former. Similarly, the expression of some provisions refers to an "entitlement" (as in social security, A34) rather than a 'right' (A35 recognises a right of access to health care).

Such variation in terminology is perhaps inevitable in view of the hybrid nature of the Charter rights. The interpretation of such linguistic differences craves the attention of further academic and judicial pronouncements. A hierarchy may be sought within the Charter rights, perhaps hinted at in its structure or language. It may be that the Charter is intended to be



looked at as a whole. Another, common, problem is the interpretation of the interaction of the rights. The clash between the rights of privacy and expression under the ECHR is a familiar play in the courts. There are other potentially interesting alignments in the Charter; scientific research and environmental protection, the right to life and human dignity and the freedom of scientific research (which in part is anticipated in the Charter in the detailed provisions in Article 3 on the right to integrity of person, which includes express prohibitions on human cloning and eugenics).

The amount of detail within each right is also variable. The right to life stands on its own (although such generality has given rise to much debate in the past). The right to integrity stands in contrast with detailed specific prohibitions in the field of medicine. As is common in human rights, many rights are expressed as broad statements of principle, leaving the detail to judicial interpretation.

Finally, the expression of many of the rights explicitly recognises and allows for a variation between Member States in the precise application of some of the rights. Hence, for example, the right to marry and found a family (Article 9), or the right to conscientious objection (Article 10), are recognised, subject to national laws. Again, this echoes the international field of human rights and recognises the reality of diversity between nations.

While the rights may attach to the citizens of Europe (and with the exception of Chapter V many may be of universal application and so apply also to non-European residents), Article 51 clearly states that the provisions of the Charter are addressed to the institutions of the Union and to the Member States when implementing Union law.

In drafting the Charter, the Commission was anxious to attain clarity and certainty. By their very nature, however, many of the rights must remain vague and dynamic. The exact implications for rights and obligations in the European Community will need to be fashioned out by the judiciary or legislature, dependent on the future of the Charter, and in the global context of the ever growing jurisprudence of human rights.

## THE RELATIONSHIP WITH ACQUIS COMMUNAUTAIRE AND NATIONAL LAWS

The Charter's basic source of legitimacy is the Amsterdam Treaty, which came into effect 1 May 1999 and has established certain procedures, which intend to secure the protection of fundamental rights within the EU context. The Amsterdam Treaty consolidated the changes of direction in the European integration process brought about by the Maastricht Treaty on European Union in 1992. In particular, it established as a general principle the obligation that the European Union should respect human rights and fundamental freedoms, as guaranteed by the

European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (Art 6.2 TEU). It also pronounced the principles upon which the European Union is founded, viz. the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law (Art 6.1 TEU). Furthermore, to place emphasis on compliance of Member States with the above provision, the Amsterdam Treaty has allowed European institutions to suspend certain rights of member states deriving from the application of the Treaty, including the voting rights of member states, if a serious and persistent breach of fundamental rights and freedoms has been determined (Art 7 TEU). Alongside these compliance procedures, powers have been entrusted to the European Court of Justice to ensure respect of fundamental rights and freedoms by the European institutions (Art 46 TEU). Finally, as a precondition of any future accession to the European Union, prospective member states must recognise and respect the principles upon which the European Union is founded which are stipulated in Art 6.1 (Art 49 TEU).

The aforementioned legal parameters have set the thrust of the legal status of the Charter. Many commentators believed that, as a result of the *primary legitimacy* of fundamental rights, the Charter should have been incorporated into the provisions of the Treaties and thus acquiring primary Community Law status. However, the momentum created by the Maastricht Treaty of the European Union during the early 1990s to formally recognise matters of justice and home affairs was short lived. The law making structures to incorporate policies into law has been slow and cumbersome. The legal instruments chosen to incorporate justice and home affairs policies into European Community law were international conventions, requiring unanimity as a decision-making procedure and subsequent ratification by national parliaments. International conventions, as intergovernmental agreements lack the teeth of direct applicability or direct effectivity afforded to EU secondary legislation (Regulations, Directives and Decisions) and do not penetrate national legal orders automatically. The envisaged thrust of the fundamental rights in the Maastricht Treaty was considerably diluted, as a result of inappropriate law making structures.

Although the Amsterdam Treaty brought many justice and home affairs matters, including asylum and immigration policy and co-operation between civil courts under the traditional law making structure of the EU, as well as incorporated into European Union law the Schengen Agreement which eliminates borders between signatory states, the thrust of the Maastricht Treaty on fundamental rights and freedoms was still restricted. To address this issue, the European Commission created a Directorate-General for Justice and Home Affairs and charged it with the responsibility to draw the Charter of



Fundamental Rights in the European Union. A unique decision-making procedure was also utilised in the sense that an *ad hoc* agency (the Convention) was created by the European Council in late 1999, with wide membership from European and national institutions to drive the project through. The function of this agency has been remarkable in achieving in a relatively short time consensus amongst its members and a quality drafted Charter that resemble, to a large extent, and has the tenor of, continental constitutions.

The Charter is drafted clearly in a legal mode. The Convention, the body established to put flesh and bone on fundamental rights in the EU presented to the European Council in Nice a document, which, if the political will was there, it could be, easily incorporated into European Law. The Convention had two options: firstly, to prepare a Charter as if it was to be part of EU Law; secondly, to present a document of a political declaration summarising the fundamental rights in the EU. Many European Institutions were in favour of the formal incorporation of the Charter into the Treaties (see the Resolutions of the European Parliament, the Committee of the Regions and the Economic and Social Committee). The Commission adopted a neutral position, leaving the option of legal endorsement of the Charter or its solemn political declaration to the European Council.

The Charter projects two basic objectives: i) the *visibility* of fundamental rights by the European citizen and ii) the *certainty* regarding the legal protection the Charter offers under European Union law. The relationship of the Charter with *acquis communautaire* balances three rules:

- (1) the rule of autonomy
- (2) the rule of compatibility
- (3) the rule of subsidiarity.

The Charter must function in a parallel and harmonious way with the EU legal order. That function safeguards the autonomy of the Charter vis-à-vis international law and also the national law of the Member states. The Charter represents the first attempt of the EU to codify rights and freedoms of the individual citizen into the EU legal order, which *strito sensu* is an economic one. Autonomy is a precondition of the Charter's function and it is explicitly recognised as a rule in Article 52(3) of the Charter, where the standards of fundamental rights prescribed by the Charter are indicative and represent a minimum protection for the EU citizen. *Acquis communautaire*, national law or even international law may provide more extensive protection.

The Charter must also function in a compatible way with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. There are two major risks associated with the parallel application of the Charter and the ECHR. The risk of

interpretation between provision of the two instruments and the risk of judicial divergence between the European Court of Justice and the Court of Human Rights. Interpretational divergence represents a remote risk, as the Charter draws legitimacy from the ECHR on a number of occasions. The thrust of the Charter's provisions is complementary to those in the ECHR and the autonomy rule stipulated in Article 52(3) of the Charter helps in marking each instrument's application territorial or substantial as the case may be. Where the danger makes itself obvious is in the judicial application of the provisions of the two instruments. As different legal *fora* are entrusted with the observance of the two regimes, theoretically the risk of judicial divergence remains intact. The fact that there is no formal link between the ECJ and the Court of Human Rights makes the risk of conflicting judgments even more realistic.

Finally, the principle of subsidiarity, established by the Maastricht Treaty must be balanced when the Charter is applied either in a political mode or in a legal mode. Subsidiarity and fundamental rights in the European Union introduce questions of relationship between the Charter and national constitutional legal orders. Although the Charter is based in a number of instances on freedoms and rights found in continental constitutions, the role of the institutions of member states, including national constitutional courts is not clear vis-à-vis the application of the Charter and national constitutions. It might be the case that national constitutions have to be amended to align their orders with the Charter in a uniform way. If, and when the Charter is incorporated into EU law, that might be necessary, as the supremacy principle will make its presence into national legal orders.

The above analysis reveals the fact that the Charter operates in a *variable geometry* with Community law, international law and national law, balancing autonomy, compatibility and subsidiarity. This balancing exercise puts the Charter in the centre of attention and fuels the debate about its constitutional origin.


## FUTURE DEVELOPMENTS AND CONCLUDING REMARKS

The Charter of Fundamental Rights of the European Union is an ambitious project that attempts to codify for the first time in the European integration process personal rights, including civil, political, economic and social rights and freedoms for the European citizen. This nexus of rights and freedoms derive from national, European and international legal instruments and is prominent of major principles such as human dignity, fundamental freedoms, equality, solidarity, justice and citizenship. The Charter also timely makes its contribution towards a transparent, accountable and effective administration at European level, by introducing the right of access to documents and the right to sound administration.



These principles are interwoven with the economic dimension of European integration and for many commentators epitomise the completion of the objectives of the Treaties. The incorporation of the Charter into European law will formalise such vision. However, there are several doubting minds that feel the Charter will be an unnecessary burden in the common market law and policy making process that could potentially hinder labour flexibility and affect adversely the competitiveness of the members states. The Nice IGC was dominated by such doubts and for the time being the Charter received a solemn declaration of political nature.

The question relating to the legal status of the Charter was not adequately addressed at the Nice IGC. The Charter was prepared as a legal document capable of being incorporated into EU law. However, ranges of issues closely related to the Charter's legal thrust were not even

tackled amongst the members of the European Council. The Charter in its own right, even if incorporated into EU law needs substantial secondary legislation in the form of regulations, directives and decisions to produce the envisaged protection for the European citizen. Incorporation of the Charter into EU law is just the beginning of a very long process to elevate the individual as subject of EU law, to a position where his or her protection is guaranteed in a constitutional manner at European level under European law. 

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